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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 71

INTERNATIONAL WORKERS ORDER and
ARTHUR LOWNDES DRAYTON,
Petitioners,

v.

J. HOWARD MCGRATH, Individually and as Attorney General of the United States, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

ALLAN R. ROSENBERG,
Attorney for Petitioners.

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Opinions Below

The opinion of the District Court for the District of Columbia (R. 58) is reported at 88 F. Supp. 873. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 63-69) is reported at 182 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on March 22, 1950 (R. 70). The petition for a writ of cer-

tiorari was filed on May 11, 1950, and was granted on October 9, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the petitioner International Workers Order, Inc., which alleges grave and irreparable financial injury caused by a permanent Government regulation, in the form of the designation made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, has standing to litigate the question whether its Constitutional rights have been denied, where the regulation was adopted without a hearing, the complaint alleges that it is factually untrue, and the case is before this Court on the affirmance by the Court below of an appeal from the granting by the District Court of the Government's motion to dismiss.

2. Whether the petitioner Drayton should have been permitted to intervene in the District Court as co-plaintiff prosecute a supplemental and ame... complaint in this cause, where Drayton's claim and the main action had questions of law and fact in common and there was asserted a right of relief arising out of the same transaction as involved in the main action, and where there was no other appropriate proceeding in which petitioner Drayton could protect his interests.

Statute and Executive Order Involved

Section 9A of the Hatch Act, 53 Stat. 1147, 1148, 5 U. S. C. Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix to the Brief for Respondents in *Bailey* v. *Richardson*, No. 49, this Term.

Statement

On February 18, 1949, the petitioner International Workers Order, Inc. (hereinafter referred to as the I. W. O.) filed a complaint requesting a declaratory judgment and injunction against the Attorney General and the members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 33). On the same date, petitioner Drayton, an employee of the Post Office Department, sought leave to intervene, add an additional cause of action against and join as defendants the members of the Loyalty Board of the Post Office Department (R. 32).

No answer to the complaint was filed. Respondents filed motions to dismiss the complaint (R. 57) and to deny the application for intervention (R. 57). The motions were granted. The allegations of the complaint and petition for intervention which for these purposes must be accepted as true, may be summarized as follows:

As a direct result of the designation by the Attorney General of petitioner I. W. O. as subversive, without notice or hearing and contrary to fact, under Executive Order 9835, and the dissemination and application of the Attorney General's designation by the Board the respondent, the I. W. O., which is a fraternal benefit non-profit insurance society, operating as an interracial federation of national group societies, has suffered and is threatened with great pecuniary loss and deprivation of valuable contractual rights and other property interests. The specific allegations to this effect include:

Many members (particularly present federal employees or prospective applicants for such employment) have resigned or withdrawn from membership in the I. W. O. thereby discontinuing their payment of dues and cancelling their insurance. The Commissioner of Internal Revenue has revoked the tax exempt status of the Order. Departments of insurance in the several states in which the I. W

O. is licensed have been instigated to initiate proceedings to revoke such licenses, thereby jeopardizing the valuable property interests which it has in such licenses and franchises. Subordinate bodies of the I. W. O. have been hampered in obtaining the use of public schools, private homes and in renting halls and similar places for the conduct of meeting, rallies, social and recreational affairs necessary for the proper functioning of the I. W. O. Members of the I. W. O. who have pending petitions for naturalization have been denied naturalization or have had their petitions held in abeyance because of their membership in the I. W. O. Employees in private plants, which have government contracts, have been or are threatened with discharge because of their membership, or that of members of their families, in the I. W. O. The I. W. O. and its members have been vilified and have suffered public shame, disgrace and economic injury (R. 16, 17, 18).

The petitioner Drayton in his specific cause of action alleges that he is and has been for more than 24 years employed by the Post Office Department as a clerk under the classified civil service; that he is and has been a member of the I. W. O., and that he desires to continue such membership with its established valuable insurance rights and benefits, that the respondents constituting the Post Office Department Loyalty Board have served him with charges looking toward his dismissal solely because of his membership in the I. W. O., that in such proceedings, the designation of the I. W. O. as "subversive" * by the Attorney General will be final, binding and conclusive, and that his dismissal on the charges preferred against him would be equivalent to a criminal stigmatization of him and would result in his disqualification not only from public but from private employment; and that he has no adequate remedy at law (R. 53, 54, 55).

* This term "subversive" is used to embrace all the categories referred to in Part III, Section 3 of Executive Order 9835.

The complaint alleged that the Executive Order on its face and as construed and applied by the Attorney General and the actions of the respondents were unconstitutional (R. 19, 20).

The relief requested was for a declaratory judgment to such effect and an injunction directing the respondents to remove the name of the I. W. O. from the "subversive" list, desist from further designating or publicizing the Order as a subversive organization, and restraining the dismissal of petitioner Drayton because of his membership in the I. W. O. (R. 22, 56).

ARGUMENT

1. The I. W. O.

As to petitioner I. W. O., the only question before this Court is whether it has standing to sue. Holding that it does, Judge Edgerton, in his dissenting opinion below, said that its standing was even clearer than that of the appellant in the *Joint Anti-Fascist* case (R. 69). We submit that Judge Edgerton's conclusion is demonstrably correct and that under the authorities and on this record, the Court below was in error in upholding the order of the District Court in granting the government's motion to dismiss.

The test of whether a petitioner has standing to sue depends on the particular statute involved and its setting. In case by case adjudication, this Court has formulated the controlling criteria, the elements of which have been stated by Mr. Justice Stone in *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407, 425:

> "The ultimate test of reviewability is not to be found in an over-refined technique but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudication that may follow, the results of which the regulations purport to control."

by Mr. Justice Reed in *Stark* v. *Wickard*: 321 U.S. 288 at 290:

> "Petitioners must show that the act of the Secretary amounts to an interference with some legal right of theirs. If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit."

and by Mr. Justice Stone for an unanimous Court in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 412, speaking of whether the District Courts have jurisdiction to entertain an independent suit in equity to review a certification of the Board:

> "It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on petitioners for which the ~~case~~ law, apart from the review provisions of the Wagner Act, affords a remedy."

See also *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 145; *American Communications Association* v. *Douds*, 339 U. S. 382; *LaCrosse Telephone Corp.* v. *Wisconsin L. R. B.*, 336 U. S. 18. Cf. *U. S.* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Standard State Co.* v. *Farrell*, 249 U. S. 571.

Petitioner here, as we shall proceed to show, fully meets these criteria. It has constitutionally protected rights which the Attorney General by his designation, under the statutory scheme here involved, has abridged and denied; and there is need and warrant for judicial review to protect those rights from the irreparable injury threatened by that designation.

As a preliminary matter, we point out that the Government by filing a motion to dismiss, has chosen to try the sufficiency and not the truth of the complaint. The complaint specifically denies that the I. W. O. is subversive,

and asserts that its designation by the Attorney General is without the slightest basis in truth or in fact (R. 18, 12, 13). The affirmative facts set forth in the complaint allege the activities of a fraternal insurance society, which are not subversive. Since the District Court granted the motion to dismiss, it must be assumed that the allegations of the complaint are true. *Stark* v. *Wickard*, 321 U. S. 302; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 414; *Hearst Radio, Inc.* v. *F. C. C.*, 167 F 2d. 225 (App. D. C.).

Even if this were not the posture of the case before this Court, we wish to point out that the procedure adopted by the Attorney General (which, we submit, is beyond the authority of the Hatch Act and of the Executive Order 9835, and in violation of petitioner's constitutional rights for reasons set forth in Judge Edgerton's dissents in the *Joint Anti-Fascist* case and in this case) necessarily breeds error. The fact is that wherever the I. W. O. has had an opportunity to meet such charges in a fair hearing before an administrative or judicial tribunal, it has successfully combatted them (R. 10-13).

PETITIONER'S RIGHTS. Petitioner is a fraternal benefit society, organized in 1930 as a mutual benefit and non-profit corporation without capital stock, under Article 7 of the Insurance Law of the State of New York, providing sickness, death and other insurance benefits to its members. It operates on the lodge system as an interracial federation of national group societies to which its members belong according to their national origins or descent, and has a representative form of government as defined by Section 452 of the Insurance Law of the State of New York. At the time of the Attorney General's designation, it was licensed to operate and did operate in eighteen states, and the District of Columbia, with 185,000 members (including employees of the federal government), 1860 lodges, life insurance policies outstanding in excess of $120,000,000, and assets of five million dollars in a ratio of 145% to liabilities or forty-five percent in excess of insurance law

requirements. Its Declaration of Principles, the types of insurance which it issues, requirements for eligibility to membership, its rates, options, benefits and system of government, are set forth in detail in the printed copy of its constitution and by-laws (R. 23, Exhibit A).

It is not denied that petitioner I. W. O. has a right to engage in the insurance business, subject to applicable state and federal laws; to solicit government employees or anyone else to become members and buy the insurance which it sells; to conduct meetings, issue pamphlets and newspapers, and make whatever advantageous economic relationships it can. Against the invasions of these rights by government officials, acting without authority or under an unconstitutional statute, the I. W. O. is protected by the First, Fifth, Ninth and Tenth Amendments. *Bell* v. *Hood*, 527 U. S. 678, 684; *Land* v. *Dollar*, 330 U. S. 730; *Larsen* v. *Foreign and Domestic Commerce Corp.*, 337 U. S. 682; *Philadelphia Company* v. *Stimson*, 223 U. S. 605.

So much is conceded in the majority opinion of the Court below:

> "* * * I. W. O. is a business corporation with income from insurance premiums which it says has been impaired by the action of the appellees. It has, therefore, a property right, which is legally protected, as it claims * * *" (R. 67).

The majority, however, held that this property right had not been *directly* affected by the Attorney General's action under the Executive Order, and, therefore, I. W. O. was without standing to sue.

This, in essence, is the Government's case (Government Brief in *Joint Anti-Fascist* case, p. 7). We submit that there is no valid basis in fact or law for it. "Concededly, the Attorney General's designation thus fixes its status (for administrative proceedings with regard to the eligibility for Federal employment of its members) in the sense that designation is not subject to reexamination in par-

ticular loyalty proceedings" (Government Brief in *Joint Anti-Fascist* case, No. 8, p. 28). The Attorney General's designation was made without notice or hearing to the I. W. O. and without affording it any of the conventional procedural safeguards ordinarily required by the due process clause (Government Brief in *Bailey* v. *Richardson*, No. 49, p. 23). And as the majority held in the Court below, no judicial review is open to the I. W. O. to test the correctness of the Attorney General's designation. "If he was mistaken as to the true character of the I. W. O., no court can cause him to change his conclusion" (R. 66).

DEFENDANTS' ABRIDGEMENT AND DENIAL OF PETITIONER'S RIGHTS. Was the I. W. O. directly injured by the Attorney General's designation? Its complaint alleges that solely as a result of defendant's acts, the Insurance Departments in the various states, under whose supervision the I. W. O. operates, have brought proceedings to cancel the charter and licenses necessary to the operation of the I. W. O. under law (R. 17).

It is said that such proceedings are only indirectly the result of the Attorney General's designation, which is merely advice to the executive departments and agencies and were not undertaken by those insurance departments pursuant to the Executive Order (R. 68, 66. See also Government Brief *Joint Anti-Fascist* case No. 8, p. 26).

The Government, however, in the plainest terms, has negated the position that the designation was merely advice to the executive departments and agencies to the President and has made it clear beyond cavil that the designation was the President's advice to the nation concerning the evil character of the designated organizations, including the I. W. O. Thus, in its Brief in the *Joint Anti-Fascist* case, No. 8, the Government says:

> "It is the President's duty and his right to inform *the people* of those *groups whose activities are in his judgment inimical to the public welfare*. His duty to inform the *nation* is particularly compelling *which, as here, organizations are, in his* opinion, engaging in

activities that constitute a *threat to our form of government.* * * * In exercising his broad power to inform the *Nation* of *potential threats to its existence*, the President is immune from judicial restraint. * * * We think it plain that the President has *this* power to *designate those who, in his judgment, are hostile to the national welfare* and equally plain that he may exercise it through the head of an executive department" (pp. 42-44, italics supplied).

The Government is here discussing, not a speech by the President or the Attorney General, but a permanent systematic regulation of Government employment embodied in law, in the course of which, the Attorney General has, purportedly in accordance with law, designated the I. W. O., without notice or hearing and contrary to fact, as a "threat to our form of government inimical to the public welfare, hostile to the national welfare, subversive, disloyal, communist."

The Attorney General's designation, thus, was not intended for the ears of the President or executive departments and agencies alone, as the Government elsewhere in its brief disingenuously asserts (Government Brief, *Joint Anti-Fascist* case, p. 32). It was intended for the nation, including the law enforcement officers and the Commissioners of Insurance in the various states (R. 17).

The peculiar sensitivity of insurance companies to rumor and the public interest in the proper protection of their operations and financial condition have long been recognized in the insurance laws of the various states. Sections 3, 16 and 29-31 of the Insurance Law of New York provide detailed requirements for the annual and other examinations of the condition of insurance companies, and prohibit the public release of adverse information until lengthy procedures have been followed, to assure the accuracy of the conclusions reached. The I. W. O., thus, by the very nature of the insurance business in which it is engaged, is in profound need of legal protection against the very type of official activity which is complained of here. See Patterson, *The*

Insurance Commissioner in the United States (Harvard University Press, 1927) p. 416.

The I. W. O.'s complaint alleges further that as a result of the Attorney General's listing, it has lost and will lose members, especially present and prospective civil servants and employees in private plants holding Army and Navy contracts and that its members in the Government service have been subjected to charges of disloyalty and dismissal because of their membership in the Order, in dismissal proceedings where the Attorney General's designation of the I. W. O. is a binding determination of its status, not subject to review, to the irreparable injury of the I. W. O. (R. 16-18).

The lifeblood of a membership organization is its membership. If, as a direct result of the Attorney General's designation, the membership of the I. W. O. who are present or prospective federal employees or who are employed in private plants holding Government contracts terminate their membership in the I. W. O., because they are unwilling to take the risk of dismissal from federal employment, they are only doing what the Attorney General's designation is reasonably calculated to have them do.

It is, of course, immaterial that the Attorney General's designation was not in the form of a command to the I. W. O. (*La Crosse Tel. Corp.* v. *Wis. L. Rel. Bd.*, supra; *Columbia Broadcasting System* v. *U. S.*, supra.) or that it operated on federal employee members of the I. W. O. rather than on the I. W. O. itself, or that it is described as "advice" to the Loyalty Review Boards, which may or may not be controlling as to the character of the employee involved (Government Brief, *Bailey* v. *Richardson*, No. 149, p. 138).

The Attorney General's designation was not an abstract determination of status; nor merely an interim adjudication in an uncompleted administrative process. It was unquestionably a final binding defamatory determination of status in a permanent governmental regulatory scheme arrived at without notice or hearing and not subject, within

the statutory scheme, to any modification by evidence or review by the Courts. It told the present or prospective member of the I. W. O. in federal employment that he could not become or remain a member of the I. W. O. without running the risk himself of being designated as subversive and disloyal and thus of being discharged, with that stigma. Such a status-fixing designation here is no less subject to judicial review, at the suit of the I. W. O., than the certification of the Wisconsin Labor Relations Board of the prevailing union, at the suit of the employer and the losing union in the *La Crosse Telephone Corp.*, case supra. *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *CBS* v. *U. S.*, supra; *Stark* v. *Wickard*, supra.

The designation is no more (and no less) controlling than the general policy with respect to option time, embodied in the F. C. C. regulations, affecting licenses. These regulations were held subject to judicial review in the *Columbia Broadcasting* case, *supra*, at the suit of the network. In that case the regulations were for the benefit of the Commission, and subject to alteration and amendment, in cases involving applications or renewals, which the Commission could adjudicate on the merits in each case. (See *F. T. C.* v. *Cement Institute*, 333 U. S. 613 at 701, "The fact that the Commission had entertained such views as the result of its prior ex parte investigations did not mean that the minds of its members were irrevocably closed on the subject of the respondent's basing point practices.")

In the light of the realities of today, it is the sheerest sophistry for the Government to assert, as it does in its Reply Brief, pp. 11-12, that the Attorney General's designation in no way compels anyone to withdraw from I. W. O. or to cancel his insurance, and that "voluntary" resignations are not a legal consequence of the designation. Such resignations are no more "voluntary" than resignations of employees from unions, when the employer uses his eco-

nomic power to coerce employees by threat of discharge from employment.*

The justiciability of the present controversy is emphasized by the fact that the action complained of invades the rights of petitioner and its members under the First Amendment. This amendment protects against official acts which "abridge" freedom of speech, press and assembly. The word "abridge" obviously includes not only direct restraints but indirect ones as well. *American Communications Association* v. *Douds*, 339 U. S. 392. Moreover, the purpose of the amendment would be frustrated if fine spun refinements were permitted to shelter executive action from prompt judicial redress. See *Perkins* v. *Elg*, 307 U. S. 325. It has long been recognized that the individual must be afforded prompt access to the courts to remove a possible restraint upon rights protected by the First Amendment even though such restraint takes the form of a mere threat. *Thornhill* v. *Alabama*, 310 U. S. 88; Note, 61 Harv. L. R. (1948) 1208.

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* The Government makes the point in its Reply Brief (pp. 8-10) that the Attorney General's designation of the I. W. O. is binding only in loyalty proceedings, not in naturalization proceedings, and that it is open to the I. W. O. or the alien to meet the accusation in the naturalization proceedings. It cites two cases in which the question of proving the character of the I. W. O. was open to the petitioner who, in each case, finally withdrew his petition without meeting the accusation. As to whether the Attorney General's designation is binding administratively in cases involving suspension of deportation, see *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, where suspension was administratively denied on the basis of the Attorney General's designation of the I. W. O. and the denial was upheld by the Court. The mere fact that the aliens who petitioned for naturalization in the two cases cited by the Government ultimately withdrew their petitions does not, of course, establish anything as to the I. W. O.

2. Arthur Lowndes Drayton

As to Petitioner Drayton, the proper question before this Court is whether on this record he should be permitted to intervene, on the basis of his motion so to do and the supplemental and amended complaint which petition filed with his motion (R. 32, 33). For the reasons which are set forth in Judge Edgerton's dissent (R. 69), we submit it was clearly an abuse of discretion by the District Court to have denied his motion.

The Government, however, has sought to inject a different question by claiming that the case as to Drayton is moot, since Drayton was cleared of charges of disloyalty and restored to federal employment subsequent to the action of the Court (Government Brief, pp. 2, 12-13). The Government also notes that one Evelyn Bornstein had moved to intervene in this cause in the District Court, prior to Drayton's motion to intervene, but subsequently withdrew her motion, after the charges against her had been dismissed by the War Assets Administration.

As to Bornstein, the facts are that after the charges of disloyalty had been lodged against her, but before they had been heard, her position with the War Assets Administration was liquidated, she was no longer a federal employee, and the charges against her were not dismissed on the merits but because the case had become moot.

As for Drayton, it is submitted that in accordance with familiar principles, where the control of employment of petitioner is in the opposing party, who exercise it *pendente lite* to affect the litigation in his favor, no weight should be attached to the present reinstatement of Drayton for the purpose of determining his rights and giving him the relief which he requests in his supplemental and amended complaint. Drayton's reinstatement is not *res adjudicata*. The charges against him may be reopened at any time, and he may be put anew to the proof on the issue of his membership in the I. W. O. Indeed, the recent public history

of such government employees as John Service and Michael Lee indicates that loyalty charges are subject to repeated reopenings, that clearance at one time is no assurance of clearance at any other, and, indeed, that to have been cleared, at all, after charges, may be itself sufficient warrant for the reopening of the case. In any event, the relief which Drayton requests is not his reinstatement, and his reinstatement should not foreclose his right to the relief which he does request. He seeks, as a member of the I. W. O., the same relief which the I. W. O. seeks for itself, and he further seeks for himself not to have proceedings against him on charges of disloyalty under procedures which he alleges violate his constitutional rights (R. 53-57). Reinstatement now, not being *res adjudicata*, will not give him the relief which he seeks, should the charges against him be reopened. As a member of the I. W. O. and as a government employee, subject to the Executive Order, he asserts interests and claims which his present reinstatement neither determines nor renders moot.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

ALLAN R. ROSENBERG,
Attorney for Petitioners.

October 13, 1950.